

❖ **Why is it important for countries to have a minimum legal age of marriage?**

It is important for any given country to have a minimum age of marriage as this legally protects children from abuse, harm, violence and exploitation (especially sexual exploitation). Article 2 of the African Charter on the Rights and Welfare of the Child (ACRWC) and Article 1 of the Convention on the Rights of the Child (CRC), define a child as a person aged below 18. Marrying off persons aged below 18 therefore amounts to child marriage and this is a harmful practice which must at all cost be prohibited, as it curtails children's right to education, reduces their chances of survival by putting their health at risk, and hampers national development, among a myriad of other negative consequences.

As a harmful practice, child marriage is prohibited by international and regional standards. When the ACRWC was adopted in 1990, one of its unique features was the entrenchment of Article 21(2), which provides that 'child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years and make registration of all marriages in an official registry compulsory'. Article 21 of the ACRWC generally protects children from harmful social and cultural practices and requires States Parties to take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child, including customs and practices that are discriminatory to the child on the grounds of sex or other status. Even though both girls and boys fall prey to child marriage, in most cases it is girls who are the victims. Thus, most societies adopt discriminatory practices by sending boys to school and giving girls into marriage. This is contrary to the protection provided by Article 21 of the ACRWC. To further ensure that girls are protected from such practices, the African Union in July 2003 also adopted the African Women's Protocol, whose Article 6 sets the minimum age of marriage for women at 18 years and prohibits harmful practices. Similarly, Regional Economic Communities have also stressed the importance of having a minimum age of marriage that is not below the age of 18 as demonstrated by the 2008 SADC Protocol on Gender and Development which provides in Article 8(2) that 'legislation on marriage shall ensure that: no person under the age of 18 shall marry'. However, Article 8(2) of the SADC Protocol goes further to say that 'unless otherwise specified by law which takes into account the best interests and welfare of the child.' Such kind of provision is of course problematic as it leaves room for differentiated regulation regarding minimum age of marriage in different countries, and sometimes within the same regime, as is the case in some States like Nigeria, which is a Federal.

Within the UN, a notable document that clearly defines the minimum age of marriage as 18, is Paragraph 36 of the 1994 General Recommendation No. 21 of the CEDAW Committee, on equality in marriage and family relations.

In line with these standards, 32 African countries have set the minimum age of marriage at 18 for both girls and boys¹ while in Algeria, Lesotho, Libya and Rwanda, the minimum age of marriage is above 18 for both girls and boys.

In 18 African countries, the minimum age is either discriminatory or below 18, with Sudan having the lowest minimum age of marriage at 10 for boys and puberty for girls for Muslim marriages (which are the most prevalent) and 13 for girls and 15 for boys for non-Muslim marriages.²

It may be asked however that what are the consequences of marrying a child? In Africa, three different legal approaches have been adopted in so far as child marriage is concerned. There are those countries which criminalise premature, early or child marriages;³ those which ban or invalidate marriage below the legally prescribed minimum age;⁴ and those which merely prescribe a minimum age of marriage without expressly criminalising or banning it, even though the consequence may be the same as express prohibition of child marriage.⁵

As mentioned above, a set minimum age of marriage protects children, more especially girls, from sexual exploitation. This is so because, girls being the most likely victims of child marriage are bound to be exploited sexually by older men under the guise of marriage if a low minimum age of marriage exists, and no proper protection mechanisms are in place in laws and policies. In most cases, protection from sexual abuse and exploitation is found in penal laws which may merely provide that it is a crime to engage in sexual activity (including carnal knowledge, indecent assault, sexual molestation) with a child of a particular age.

¹ These are Angola, Benin, Botswana, Cape Verde, Central African Republic, Comoros, Djibouti, Egypt, Eritrea, Ethiopia, Gambia, Ghana, Guinea, Kenya, Liberia, Madagascar, Mali, Mauritania, Mauritius, Morocco, Mozambique, Namibia, Nigeria, Sao Tome, Sierra Leone, Somalia, South Africa, South Sudan, Togo, Tunisia and Uganda.

² In Burundi, Burkina Faso, Cameroon, Chad, Congo Brazzaville, Cote D'Ivoire, DRC, Gabon, Mali, Niger, Senegal, Seychelles, Sudan, Tanzania, and Zimbabwe, it is discriminatory between girls and boys. In Malawi, Zambia and Guinea Bissau the minimum age of marriage for both boys and girls is 15 and 16 respectively.

³ These are, Botswana, Burkina Faso, Cameroon, Central African Republic, Chad, Congo Brazzaville, Democratic Republic of Congo, Egypt, Ethiopia, Gabon, Ghana, Kenya, Liberia, Malawi, Mali, Mauritania, Nigeria, Rwanda, Senegal, Sierra Leone, South Sudan, Swaziland, Togo, Zambia and Zimbabwe

⁴ Angola, Burundi, Cape Verde, The Gambia, Mauritius, Mozambique, Namibia, Sao Tome and Principe, South Africa, Tanzania and Uganda.

⁵ These are Algeria, Benin, Comoros, Cote d'Ivoire, Djibouti, Eritrea, Guinea, Guinea Bissau, Lesotho, Libya, Madagascar, Morocco, Niger, Seychelles and Tunisia.

Marrying a young girl may be used as a means to sexually exploit a girl, in which case, consent to sex is presumed as a natural consequence of the marriage. Thus, it is very important that the law also provides for a minimum age of sexual consent, and that the minimum age of marriage is not set lower than the minimum age of sexual consent, as a valid marriage needs to be consummated. Discrepancies in this regard can be seen in countries like Malawi where the minimum age of marriage is 15 while the age of sexual consent is 16, and Sudan where the minimum age of sexual consent for girls is 18 years, while girls are allowed to marry at puberty for Muslim Marriages, and at the age of 13 for all other marriages. In about 15 African countries however, the minimum age of sexual consent is 18,⁶ whereas it is lower than 15 in 8 countries.⁷

❖ How do you explain legal exceptions allowing underage marriage with parents' or court's authorisation?

Based on the standards set at both the international and regional levels, many African countries have taken the noble step of harmonising their laws accordingly but others have not taken such steps. To date 32 countries in Africa have set the minimum age of marriage for both girls and boys at 18. However, notwithstanding such progress, there are some countries which despite providing for a minimum age of marriage, also provide for an exception to that minimum age upon parental consent or court's authorisation. For example:- in Angola, the minimum age of marriage is 18 but the law allows for marriages below the age of 16 for boys and 15 for girls upon obtaining consent of parents, which is mandatory in such cases.; in Burkina Faso, the minimum age of marriage is 17 for girls and 20 for boys, but the Civil Court must undertake the necessary investigation where an exemption will not be granted for a man under 18 years and a woman under 15 years; in Ethiopia, the minimum age of marriage is 18 but the law authorises the Minister of Justice to authorise marriages of persons aged below 18; in Malawi, even though the Constitution provides that persons aged 15 may marry, they can only do so with parental consent unless one is aged 18 or above.

Such an approach, of having exceptions to the minimum age of marriage, violates the children's right to protection, as parental consent may be abused in the sense that it may unnecessarily be given simply because a girl is pregnant and the family would like to avoid the embarrassment of an unmarried daughter falling pregnant; or they want to avoid the

⁶ These are, Benin, Burundi, Democratic Republic of Congo, Egypt, Equatorial Guinea, Eritrea, Ethiopia, Libya, Mauritania, Niger, Rwanda, Somalia, South Sudan, Tanzania and Uganda

⁷ Burkina Faso, Comoros, Congo Brazzaville, Guinea, Niger, Chad, Madagascar, and Togo

responsibility of having to feed one more mouth; or sometimes the consent may even be sought by the child, but the parents themselves may force a child to marry in the hope that they will receive financial and material assistance from the husband.

It is recommended therefore that countries which still provide for exceptions allowing underage marriage with parental consent or court's authorisation should abolish such laws and allow for no exceptions to the minimum age of marriage.

❖ **What are the main challenges in enforcing minimum age of marriage legislation?**

One of the major challenges in enforcing minimum age of marriage legislation is that this is a practice embedded in beliefs associated with cultural and sometimes religious norms, which are not easy to change. Consequently, early marriage is not viewed as a criminal offence, as families view it as a culturally legitimate practice. Addressing attitudes and customs that promote or condone the practice is vital to changing the legally acceptable minimum age of marriage.

Sometimes this is also perpetuated by the prevalence of plural legal systems pertaining to marriage, of which many societies tend to opt for the traditional system as traditional norms relate to the lives of the citizens. This challenge has often been cited by the United Nations Committee on the Rights of the Child (UN Committee) and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC), as a major challenge in the fight against child marriages. In its 2008 Concluding Observations to Eritrea, the UN Committee expressed its concern regarding, the pluralistic nature of Eritrea's legal system which was not harmonised with international standards. The Committee was concerned that customary laws still constitute an obstacle to the implementation of the Convention, and recommended Eritrea to strengthen and expedite its efforts to bring domestic law (both formal and customary) into full compliance with the CRC by completing a comprehensive review of legislation by the Child Law Committee and implementing legislative amendments.⁸ Similarly, the UN Committee urged the government of Sierra Leone, to undertake child rights promotional activities in communities which practice arranged marriages of young girls, with a view to ensuring that a minimum age of marriage would be met once it was established.⁹ The African Committee of Experts on the Rights and Welfare of the Child has also made recommendations for harmonisation of laws on marriage in its Concluding

⁸ UN Committee Concluding Observations to Eritrea's State Party Report 2008

⁹ UN Committee Concluding Observations to Sierra Leone's State Party Report 2000.

Recommendations. Following Initial State Party Reports submitted to the African Committee, the Committee recommended that Kenya, Egypt Mali and Niger harmonise the minimum age of marriage with the African Charter on the Rights and Welfare of the Child.

Another challenge is that there is a lack of national monitoring and enforcement mechanisms for those who flout the law. This is also further compounded by the fact that not all countries have specialised justice systems with Children's Courts and Child Protection Units across all regions. It is therefore not easy to access child-friendly mechanisms to enforce violations of protection from child marriage. In addition birth registration systems are not effective in most African countries hence it is not possible sometimes to determine the actual age of a person claiming to be old enough to marry.

Furthermore, in some cases, there are no provisions for legal consequences for those who contravene the minimum age of marriage legislation. In such instances although the legislation may provide that child marriage is either invalid or prohibited, there is no penal element, or sanction associated with such an act, which therefore adversely affects the enforcement of minimum age of marriage provisions in national legislation.

❖ In many communities where customary and religious laws condone the practice, these take precedence over national law. How does this type of plural-legal system affect efforts to address child marriage?

A plural legal system is one where two or more systems for redress exist in the same nation. These may be based on formal laws, religious laws and traditional systems based on customary laws. The formal legal system is put in place by the government and comprises statutory laws, judicial institutions as well as related systems and mechanisms. A religious legal system is based on the beliefs of a particular religion. The traditional legal system is based on non-legal forms of normative social ordering, that have existed in communities for a long time. These traditional systems often vary from community to community and comprise tribunals presided over by traditional and community leaders who have no legal training but are well versed with traditional norms.

Within some plural legal systems in Africa, customary laws are given Constitutional recognition as part of the State's law. In relation to marriage, ten Constitutions in Africa¹⁰ recognise customary marriages. Of these, Kenya's Constitution (2010) mandates the

¹⁰ Kenya, Liberia, Malawi, Mozambique, Namibia, Uganda, Sudan, Sierra Leone, Eritrea, and Ethiopia.

government to enact a law that recognises marriage concluded in the religion and tradition of the spouses (Article 45(4)). The Namibian Constitution (1998) also expressly provides for marriages under customary law to be recognised in order to prevent compulsion to testify against a spouse (Article 12(1)(f)).

In most instances the Constitution expressly indicates its supremacy in relation to any other law, as seen in the Constitutions of Kenya (Section 2), Ethiopia (Article 9), Nigeria (Section 1) Malawi (Section 5), Uganda (Chapter 1(2)) and Sudan (Article 3). Thus, any set minimum age of marriage or any other condition for the capacity of marriage which is sanctioned by law or customary practice will be deemed void to the extent of its inconsistency with the Constitution. However, except for the Constitutions of Kenya (Sections 45(2) and 260), Malawi (Section 26(2)) and Uganda (Chapter 2(1)), and the draft Constitutions of Zambia (Section 55(5)) and Zimbabwe (Section 4.35), the minimum age of marriage is not necessarily provided for in the Constitution nor can it be construed from any constitutional provision, but in subsidiary statutory laws in the rest of the countries. Mostly, African Constitutions provide for the right to establish a family by an adult or a person of marriageable age. In such a case therefore, where different minimum ages prevail, the question as to whether it is the statutory law or customary law which should be adopted, depends on which one provides a higher minimum age as that implies a better protection to the child, in light of other constitutional principles, of which it is usually the statutory law. Where the minimum age of marriage is provided in the Constitution the legal system grants a stronger protection from early marriages by avoiding the possibility of legitimatising such marriages in subsidiary laws.

In other pluralistic legal systems, the minimum age of marriage is governed by both religious law and statutory law. In Eritrea, a codified customary law exists called the Logo Chwa Code of Customary Law (1935). The Code expressly provides for a minimum age of marriage which is 15 for females and 18 for males, while the Eritrea Civil Code maintains 18 years for both genders. In Sierra Leone the Christian Marriages Act (1923) and the Civil Marriage Act (1910) prohibits conclusion of marriage by persons of whom each or either not being a widow or widower is under the age of twenty-one years (Section 7 of both). Customary Marriage and Divorce Act (2009) maintain 18 as the minimum age (Section 2) and the Muslim Marriage Act (1905) allows the Muslim Law to apply. In Mozambique (Family Law, 2004) and Ethiopia (Family Code, 2000, Article 1, 26 and 27) however, the law recognises

religious, civil and customary marriages but provides for 18 as the minimum age of marriage for all these types of marriage.

The major problem with plural legal systems in addressing child marriage is that in most cases, traditional and religious laws may not be in harmony with international and regional standards and sometimes with the national Constitution. Customary law in Africa is mostly unwritten, often administered by traditional leaders without a legal background, and who may not appreciate the international standards. States must therefore work towards, harmonising all laws with international and regional standards.

❖ **What recourses are available for children married under customary law?**

Children who marry under customary law may seek recourse through the formal justice system. Child marriage may in most cases not infringe the customary law under which the child was married unless the law specifically provides for a specific minimum age for those who marry under customary law, and that minimum age of marriage under customary law has been infringed, in which case, the marriage may be nullified and damages may be claimed by the girl (but this is very unlikely). Therefore, the best recourse for the child is the formal justice system where the child may claim compensation in the form of damages, or where the 'partner' may face criminal sanctions in systems where child marriage has been prohibited and criminalised. For example, in the Comoros, where the minimum age of marriage is 18, Section 299 of the Penal Code (1982) provides that 'whoever, when it comes to consummation of a marriage under the traditional law has done or attempted to perform the sexual act on the person of a child under 13 years of age or immature will be punished by two to five years imprisonment'. Thus, while recognising traditional marriages, the law provides for special protection for children aged below 13, such that it is not a defence to claim that one has been married to the child under the customary law regime.

❖ **Governments across Africa have signed up to international and regional human rights obligations which prohibit child marriage. And yet rates of child marriage remain high. How useful are international and regional standards in protecting children from child marriage?**

International and regional standards are very important in protecting children from child marriage. As indicated above, 18 years is the internationally and regionally established minimum age of marriage as per the African Charter on the Rights and Welfare of the Child

and other instruments. All countries which have ratified these instruments have an obligation to take legislative and other measures to implement the provisions of those instruments. In addition, the ACRWC and the CRC both create obligations on States Parties to submit periodic reports on how they are implementing the rights contained in the treaties. So far, 15 countries have revised their minimum age of marriage to 18 following the ratification of the African Charter on the Rights and Welfare of the Child as shown in the table below. The case of South Sudan is unique in that it revised the minimum age of marriage to 18 in 2009 even before becoming a Member State to the AU and it has not yet ratified the ACRWC.

There is no value in countries ratifying Conventions if they do not align their legislation and policies with the international and regional standards. That is why the Conventions create monitoring bodies like the ACERWC and the UN Committee to ensure the implementation of the rights contained therein by States Parties. Furthermore, States Parties to the ACRWC and the CRC are obliged to submit reports on the progress of implementation of the two instruments. However State Party Reporting by African States remains generally weak. While all 52 African States which have ratified the CRC¹¹ have reported at least once to the UN Committee since ratification, in the regional context, only 17 countries out of the 47 that have ratified the ACRWC, have submitted reports to the African Committee. Given the cultural dimension of early marriage in Africa, the ACRWC has a specific and stronger provision that protects children in Africa from harmful practices such as early marriage, although States Parties do not report timely on its implementation.

If all African countries respect and meet their obligations under the ACRWC, first of all to take legislative measures by setting 18 years as the minimum age of marriage; secondly to take other measures by ensuring that systems are in place for protecting children from entering or being forced to enter into marriage; and thirdly, to submit periodic reports to treaty bodies on how they are actually ensuring that children are protected from marriage, the rate of child marriage would be significantly reduced and societal attitudes would easily be changed to understand that it is a violation of children's rights to allow or force them to get married before the age of 18.

Table 1: Countries which have revised their minimum age of marriage to 18 years for both girls and boys after ratification of the ACRWC

¹¹ Only Somalia and South Sudan are yet to ratify the CRC in Africa.

Countries where the minimum age of marriage is 18 years	Year of ratification of the ACRWC	Year of law reform for the minimum age of marriage
Benin	1997	2007
Botswana	10/07/2001	28/12/2001
Egypt	2001	2008
The Gambia	2000	2005
Guinea	1999	2008
Kenya	2000	2009
Liberia	2007	2011
Madagascar	2005	2007
Nigeria	2001	2003
Sierra Leone	1992	2007
South Sudan	2013-signed	2009
Swaziland	2012	2012
Togo	2003	2007
Tunisia	1998	2007
Uganda	1994	1995

❖ If we make child marriage illegal, won't it just drive the practice underground?

Making child marriage illegal will not necessarily drive the practice underground. For any law to be effectively implemented, especially if it is a law that borders on changing traditional practices that are deeply engrained in people's way of living, there is a greater need for massive awareness raising on the importance of such a law, and the negative implications of the traditional norm that the law seeks to protect society from. In the case of child marriage, society must be made aware of its health, educational and developmental effects on children as well as its legal consequences.

There must be mechanisms for children to report or be able to run away from marriage and receive enough protection so that they will not be forced to go back either for lack of financial support or due to pressure from parents or guardians. Thus the need for spelling out clear consequences of child marriage especially having it criminalised, cannot be overemphasised, because criminal sanctions may serve as a good deterrent for child marriage.

At least 24 countries in Africa have adopted this approach. These are, Botswana, Burkina Faso, Cameroon, Central African Republic, Chad, Congo Brazzaville, Democratic Republic of Congo, Egypt, Ethiopia, Gabon, Ghana, Kenya, Liberia, Mali, Malawi, Mauritania, Nigeria, Rwanda, Senegal, Sierra Leone, South Sudan, Togo, Zambia, and Zimbabwe. However, it must be pointed out that among these 24 countries that have legally prescribed clear and stronger sanctions for early marriage, 9 have discriminatory minimum ages of marriage,¹² and two have set the minimum age of marriage below 18 years.¹³

For those systems which criminalise child marriage, the penalties vary from one country to another. For example, in Botswana, the punishment is a fine of between 30,000 and 50,000 Pula, or imprisonment for a term of seven to ten years or both; in Burkina Faso, imprisonment for one to three years; in Central African Republic, imprisonment of two months to two years; in DRC, five to twelve years of penal servitude and a fine of 800,000 to One Million Congolese Francs; in Ethiopia, up to seven years' imprisonment depending on the age of the minor; in Malawi, 10 years' imprisonment; in Nigeria, a fine of 500,000 Naira or imprisonment for a term of five years or both such fine and imprisonment; in Sierra Leone, a fine of not less than 500,000 Leones or to imprisonment for a term not exceeding one year or to both such fine and imprisonment; in Togo, one to three years imprisonment and a fine of One Million Francs.

However, even though criminalising child marriage is one deterrent mechanism, it is important to focus more on addressing the core causes of child marriage. The main driver of early marriage in Africa is poverty. It is therefore important for any legal system to formulate and implement social and economic policies and social protection programmes that build the capacity of children, families and communities and strengthen their resilience against economic challenges that lead them to marry off their children particularly girls. This is so because poverty may cause the practice to still be undertaken underground despite it being made criminal. In addition, creating specialised and effective justice systems that can ably implement laws and policies which protect children from all forms of harmful practices, provides a mechanism for redress which can be trusted and counted on by both girls and boys, as well as the community as a whole.

¹² Burkina Faso, Cameroon, Chad, Congo, Democratic Republic of Congo, Gabon, Mali, Senegal, Zambia and Zimbabwe.

¹³ Malawi set at 15 years and Zambia set at 16 years respectively.

❖ What would a successful legal and policy framework to prevent child marriage look like?

A successful legal and policy framework would comprise standards that have been aligned with the international and regional framework for protecting children from child marriage. It would therefore;

- Set the minimum age of marriage at 18 years
- Not provide for exceptions for persons aged below 18 to get married upon parental consent or Court's authorisation
- Adopt a consolidated law on children
- Establish an effective birth and marriage registration system
- Criminalise child marriage and provide for clear sanctions
- Establish the necessary institutional framework and enforcement mechanisms such as specialised Children's Courts, and Child Protection Police Units..Institutions such as National Human Rights Institutions, the Office of an Ombudsperson for Children, National Commission for Children, responsible for coordinating the implementation of children's rights must also be established and operational
- Establish a strong child protection system as protecting children from any form of harmful practice must be approached in a holistic way since interventions in the education, health and even social protection sector can significantly reduce the risk of a child getting married prematurely
- Remain accountable to treaty bodies by submitting timely State Party Reports which include an explanation of the measures put in place to prevent child marriage and protect children from the same

❖ Examples of good legal systems

A number of countries in Africa, such as Botswana, Central African Republic, Egypt, Ethiopia, Ghana, Kenya, Liberia, Mauritania, Nigeria, Sierra Leone and South Sudan have adopted a strong legal framework to protect children from early marriage by setting the minimum age at 18years and criminalising child marriages. Amongst these, Kenya can be further cited as one of the best systems in terms of having a strong legal and policy framework to prevent child marriage. Kenya has ratified most of the core instruments related to child rights including the African Charter on the Rights and Welfare of the Child, the CRC

and its first two Optional Protocols, the ILO Conventions on the Minimum age of Employment and on the Worst forms of Child Labour, and in the case of Kenya, the African Women's Protocol. It has also made good progress in harmonising child-related laws with international standards as it was one of the first countries in Africa to come up with a consolidated children's statute. The minimum age of marriage can also be construed from the Constitution of Kenya (2010) as 18 years for both girls and boys. . In addition, the Child Act (2001) provides for a non-discriminatory minimum age of marriage which is set at 18 years for both boys and girls and further provides that children subjected to early marriage are entitled to measures of special protection. Child marriage is punishable by a term of imprisonment not exceeding twelve months, or a fine not exceeding fifty thousand shillings or by both such imprisonment and fine.

Kenya was also one of the few countries in Africa to have a separate and specialised justice system for children, by establishing Children's Courts, where measures specifically applicable to children apply. To follow up on implementation of child-related laws, Kenya also established an independent coordinating organ for children's rights, the National Council for Children's Services (NCCS). There is also the National Commission for Human Rights, which is responsible for monitoring implementation of human rights including children's rights. In terms of its obligations to submit periodic reports to treaty bodies Kenya has demonstrated good practice by submitting reports to both the UN Committee on the Rights of the Child and the African Committee of Experts on the Rights and Welfare of the Child (only 17 African countries have submitted reports to the African Committee), even though it's next periodic reports to both Committees are long overdue.

References

The African Report on Child Wellbeing 2013, forthcoming at the African Child Policy Forum www.africanchildforum.org

The Child Law Resources, available at:

<http://www.africanchildforum.org/site/index.php/resource-centre/child-law-resources-voluem-ii-english.html>

Summary of laws on minimum age of marriage in Africa, available at:

<http://webcache.googleusercontent.com/search?q=cache:U0a2P8DeidQJ:www.africanchildin>

fo.net/index2.php%3Foption%3Dcom_sobi2%26sobi2Task%3Ddd_download%26fid%3D1280%26format%3Dhtml%26Itemid%3D61+%&cd=1&hl=en&ct=clnk